NG SHIUH HUEI A

v.

ASSET FIRST SDN BHD & ANOR

HIGH COURT MALAYA, KUALA LUMPUR B
YEOH WEE SIAM J
[CIVIL SUIT NO: 22 NCVC-1094-11-2011]
26 JUNE 2013

LEGAL PROFESSION: *Duty of care - Retainer - Whether retainer could be implied from conduct of parties - Whether legal firm acted for plaintiff in property transactions - Whether firm breached duty of care to plaintiff in failing to ensure vendors of properties were actual owners - Whether plaintiff contributorily negligent - Whether defence of contributory negligence available although not specifically pleaded* C D

TORT: *Negligence - Professional negligence - Whether legal firm acted for plaintiff in property transaction - Whether firm breached duty of care to plaintiff in failing to ensure vendors of properties were actual owners - Whether plaintiff contributorily negligent - Whether defence of contributory negligence available although not specifically pleaded* E

The plaintiff entered into an investment agreement ('the asset agreement') with the first defendant ('AFSB') under which, in return for payment of an administrative fee, AFSB would act on the plaintiff's behalf to buy auctioned properties at below-market F rates for re-sale. The second defendant ('D2') was not a party to the asset agreement but was appointed by AFSB under a separate agreement ('LSA') to provide legal services to AFSB and its clients in respect of the property transactions involved under the asset agreement. The plaintiff paid RM250,650 for the purchase G of five properties under the asset agreement. This amount was kept in D2's client's account. In addition, the plaintiff paid RM3,048.20 to D2 as legal fees, stamp duties and disbursements for the purchase and re-sale of two of the five properties. When he discovered that the properties did not belong to the vendors H as stated in the respective sale and purchase agreements ('SPAs'), the plaintiff sued the defendants for the return of the RM250,650 and the RM3,048.20 with interest. Having obtained judgment in default against AFSB for breach of the asset agreement, the plaintiff proceeded against D2 for loss and damages he suffered as I a result of D2's negligence in failing to ensure that the vendors described in the respective SPAs were in fact owners of the properties concerned. D2's defence was that the plaintiff had

never appointed the firm as his solicitor and therefore, it did not owe him any duty of care. D2 stated that the plaintiff had never dealt directly with the firm at any stage of the transactions but solely with AFSB. D2 also sought to evade liability by saying all searches and legal documentation and attendance to payment of stamp duty in respect of the property transactions were not done by D2 but by the legal wing of AFSB called Alseth, which was a separate company. D2 contended that even if the firm was held to be liable, the plaintiff had been contributorily negligent in the manner he conducted his transactions with respect to the properties.

Held (allowing plaintiff's claim against second defendant):

(1) By receiving the full purchase price for the five properties and keeping it in its client's account, by attesting the SPAs and by issuing official bills and receipts to the plaintiff for payment of the purchase price, legal fees and disbursements and by forwarding stamped copies of the SPAs to the plaintiff under cover of its letterhead, D2 could not deny that it was acting as the plaintiff's solicitor in the SPAs. Even though there was no written retainer, it could be presumed or implied from the preponderance of evidence as shown by the conduct of the plaintiff and D2 that there was in fact a retainer of D2 by the plaintiff for the sale and purchase of the five properties. D2 had clearly allowed its name to be used as the solicitor on record for the SPAs. (paras 59, 74 & 80)

(2) It was immaterial that the purchase price for the five properties was paid before, and not after the SPAs were signed. What was material was that D2 willingly accepted the sum and kept it in its client's account and made no protest about it. Therefore, D2 could not deny that it was acting as stakeholder for the monies paid. (para 75)

(3) Even though the plaintiff purchased the properties pursuant to the asset agreement, D2 owed the plaintiff a duty of care to do the necessary searches on the properties to ensure he was buying the properties from their true owners and that he would be guaranteed the beneficial ownership, and finally the legal ownership, of those properties. Hence, D2 was negligent in exercising its duty of care to the plaintiff with regard to the sale and purchase of the properties. (paras 66, 76 & 81)

(4) Alseth was appointed by D2 under the LSA to assist D2 in all the legal documentation, *etc.* regarding the transactions for the properties. Between AFSB, D2 and Alseth, only D2 practised as a legal firm and when it attested the relevant signatures of the parties in the SPAs, D2 held itself out as the solicitor on record for the plaintiff. This was further fortified by the official bills and receipts issued by D2 in respect of the transactions. (paras 77 & 78)

(5) There was contributory negligence by the plaintiff. D2's failure to specifically plead contributory negligence was not fatal to its case. The plaintiff never took the trouble to investigate the investment scheme or to meet the vendors of the five properties before paying the full purchase price and entering into the SPAs. The plaintiff merely relied on the asset agreement and instructions from AFSB. Even though D2 was not present to attest his signatures on the SPAs, the plaintiff went ahead and signed them at AFSB's office. He never applied his mind to think that he had to meet and confirm with D2 regarding all the legal work and documentation that had to be done in respect of the transactions involving the properties. Due to the plaintiff's contributory negligence, D2's liability in relation to the plaintiff's claim for RM250,650 should be reduced by half. (paras 86 & 87)

Case(s) referred to:

Bolam v. Friern Hospital Management Committee [1957] 2 All ER 118 ***(refd)***

Choo Ah Kow v. Yeow Yew Thiam & Anor [1989] 1 CLJ 128; [1989] 1 CLJ (Rep) 14 SC ***(refd)***

Dato' Seri Au Ba Chi & Anor v. Malayan United Finance Bhd & Anor [1989] 2 CLJ 801; [1989] 1 CLJ (Rep) 460 HC ***(refd)***

Greaves v. Baynhem Meikle [1975] 3 All ER 99 ***(refd)***

Hagemeyer Trading Co (M) Sdn Bhd v. Gibson Trading Co [1978] 1 LNS 58 FC ***(refd)***

Hamizan Abd Hamid v. Wong Kok Keong & Anor [1994] 4 CLJ 122 HC ***(refd)***

Isaacs & Sons v. Salbstein [1916] 2 KB 139 ***(refd)***

Swamy v. Mathews & Anor [1967] 1 LNS 174 FC ***(refd)***

Taman Zahari Zabidi Sdn Bhd v. Adnan Sundra & Low & Anor [1990] 1 CLJ 891; [1990] 1 CLJ (Rep) 266 SC ***(refd)***

Wong Kiong Hung & Anor v. Chang Siew Lan & Another Appeal [2009] 3 CLJ 751 CA ***(refd)***

A *For the plaintiff - Christie Soosay Nathan (Tee Chor Wai with him); M/s Ong Kok Bin & Co*
For the 2nd defendant - Rajinder Singh; M/s Rajinder & Goh

Reported by Ashok Kumar

B

JUDGMENT

Yeoh Wee Siam J:

C **Background**

[1] This suit was heard in a joint trial with another suit, Civil Suit No. 22NCVC-1222-12/2011 ("the 1222 Suit") in view of similar causes of action against similar defendants, except for the D fact that different plaintiffs and properties are involved in the two suits.

[2] This judgment is in respect of the present suit only.

Brief Facts

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[3] On 11 February 2009, the plaintiff executed an agreement ("the asset agreement") (CBOD5 Part B pp. 31 to 34) with the first defendant where, upon payment of an administrative fee, the first defendant was to render services ("the services") to the F plaintiff for purchase, re-sale or rental of properties. In order to render the services, the first defendant shall, *inter alia*, source for auctioned properties at a guaranteed minimum rate of 25% below the market value and then make them available to the plaintiff for such purpose.

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[4] The plaintiff alleged that, pursuant to the asset agreement, the second defendant was appointed as his solicitor in the conduct of the transactions regarding the five properties ("the properties") which he purchased, which are the subject matter of the claim in this action.

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[5] The plaintiff paid the total purchase price of RM250,650, which were kept in the second defendant's client's account for the properties, and total legal fees and disbursements of RM3,048.20 to the second defendant.

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[6] Subsequently, the plaintiff discovered that the properties did not belong to the purported vendors.

[7] Judgment in default was obtained by the plaintiff against the first defendant on 2 December 2011.

[8] The plaintiff is now suing the second defendant for loss and damage suffered by reason of the breach of his duties and responsibilities as his solicitor.

[9] The plaintiff's claim against the first and second defendants, as stated in the writ of summons and statement of claim, is for:

(a) the sum of RM250,650;

(b) the refund of RM3,048.20 being legal fees, stamp duties and disbursements from the second defendant;

(c) interest at the rate of 4% per annum on RM250,650 from the date of filing of the writ of summons to the date of full settlement;

(d) costs of this action; and

(e) further relief as the court deems fit.

Issues

[10] The issues to be decided by the court are:

1. whether there is a contract of appointment ("the contract") between the plaintiff and the second defendant, and, if there is none, whether the second defendant was retained/appointed ("appointed") in any other way as a solicitor for the plaintiff;

2. whether the second defendant breached the contract by failing to carry out its professional duties;

3. whether the second defendant is liable for the tort of negligence; and

4. whether the plaintiff is entitled to be paid for the loss and damage suffered.

Whether There Is A Contract Of Appointment ("The Contract") Between The Plaintiff And The Second Defendant, And, If There Is None, Whether The Second Defendant Was Appointed In Any Other Way As A Solicitor By The Plaintiff

[11] The plaintiff relied on cl. 6 of the asset agreement to show that the second defendant was appointed by the plaintiff and the first defendant to act for the plaintiff:

> 6. Agreed Legal Firm means that the Resident and AFSB hereby have agreed to appoint Messrs Jagmohan Singh & Associates or Messrs Bavani or any other legal firm appointed by AFSB to act on behalf of Resident on all the relevant transactions arising from this Terms and Conditions and such Sale and Purchase as so arising/connected under this Terms and Conditions.

[12] From the above cl. 6, it is clear that the second defendant/agreed legal firm was appointed by the plaintiff/resident and the first defendant/AFSB to act on behalf of the plaintiff/resident in all relevant transactions regarding the sale and purchase of the properties. However, as submitted by counsel for the second defendant, there is no privity of contract between the plaintiff and the second defendant because the second defendant is not a party to the asset agreement which was executed between the plaintiff and the first defendant. The second defendant has no contractual obligation to the plaintiff under the asset agreement, and is not bound by it, since he is not a party to the agreement.

[13] Jagmohan Singh ("Jagmohan") (DW1), the sole proprietor of the second defendant, contended that the second defendant was only governed by the legal services agreement ("LSA") (CBOD6 Part C pp. 4 to 8 ie, exh. D59) that he executed with the first defendant on 13 November 2006.

[14] Clauses 1, 2 and 3 of the LSA (exh. D59) provide:

> 1. It is hereby agreed that AFS shall strictly utilize the legal services of the firm of Jagmohan Singh & Associates (or assigned Legal Firm with the prior consent obtain from AFS) for all the legal services arising from the service provided by its establishment to the Individual members purchasing properties through the AFS establishment.
>
> 2. AFS hereby agrees that all the legal work, documentation and other arising legal matters from the services provided in Malaysia and outside of Malaysia shall be utilizing the services of the firm of Jagmohan Singh & Associates or through the appointed affiliate offices of Jagmohan Singh & Associates. In consideration of the complete legal work and other related service being given by AFS to Jagmohan Singh & Associates (hereinafter referred to as the Legal Firm), Legal Firm shall provide the service of drafting agreements only strictly for AFS free of charge.
>
> 3. Legal Firm hereby agrees to provide the Legal services to its Individual Purchaser for the purchasing of properties at the agreed Professional Fees (ie, 1% of each individual

> purchase price) at a half discounted sum and the charges for disbursement shall be the normal chargeable legal rate charges of the country. The said fees shall be collected from the Individual Purchaser by the Legal Firm at the time of execution of the legal documents or other relevant documents prepared by the Legal Firm/Alseth Corporation (M) Sdn. Bhd.

[15] As contended by the second defendant, it can be seen clearly from the LSA that the first defendant is the one who appointed the second defendant to provide all the legal services, including all the legal work and documentation required by the first defendant. This is to enable the first defendant to provide the services to the "individual purchaser" which includes the plaintiff. Nowhere is it stated in the LSA that the second defendant was appointed by the plaintiff for the property transactions in this suit.

[16] Neither is it pleaded in the statement of claim that the plaintiff appointed the second defendant as its solicitor. There is not a single document produced by the plaintiff to prove such appointment.

[17] The question that arises is whether the second defendant was appointed by the plaintiff as his solicitor in these sale and purchase transactions.

[18] In *Dato' Seri Au Ba Chi & Anor v. Malayan United Finance Bhd & Anor* [1989] 2 CLJ 801; [1989] 1 CLJ (Rep) 460; [1989] 3 MLJ 434, the High Court held:

> There was no written retainer of the second defendant by the Plaintiff. But there is no legal requirement for retainers to be in writing - *Corderey on Solicitors* (7th Ed) at p 50.

[19] In *Taman Zahari Zabidi Sdn Bhd v. Adnan Sundra & Low & Anor* [1990] 1 CLJ 891; [1990] 1 CLJ (Rep) 266; [1990] 1 MLJ 424 the Supreme Court held:

> There was no written retainer of the respondent by the appellant but a retainer will be presumed if the conduct of the parties shows that the retainer of solicitor and client has in fact been established between them (*Corderey on Solicitors* (7th Ed) at p 578).

[20] The second defendant submitted that the plaintiff went into the investment scheme with the first defendant for making quick profit. The plaintiff did not care and did not adhere to or comply with the SPAs themselves (see cl. 10 of SPA). Throughout the

dealings, the plaintiff placed sole reliance on the first defendant to the exclusion of the second defendant. This can be shown, *inter alia*, in the following instances:

(i) Even before the five SPAs were executed, the plaintiff paid the full purchase price for the five properties and such sum was kept in the second defendant's client's account;

(ii) Clause 18 of the asset agreement provides that vacant possession was to be handed over by the first defendant to the plaintiff (CBOD5 Part B p. 32) within 45 days of executing the SPA for the transaction that was obtained and secured by the first defendant for the plaintiff.

The second defendant further submitted that the plaintiff did not at any time seek to specifically enforce the asset agreement of the SPAs for the five properties. The sole reason was due to the fact that the plaintiff was aware that the SPAs were mere instruments for the investment mechanism with the first defendant. Otherwise, if the plaintiff was a genuine purchaser, he would have requested for delivery of vacant possession in accordance with cl. 18 of the asset agreement;

(iii) The legal files on the SPAs were actually located in the office of the first defendant;

(iv) Through the first defendant's website information, roadshows and letters to residents (eg, CBOD1 Part B pp. 83, 88, 94 and 95), it was made clear by the first defendant to the residents/individual purchasers, including the plaintiff, that the first defendant would liaise with the bank for completion of documents, and use Alseth, ie, the legal division of the first defendant, to conduct the necessary checks on all the properties, details and ownership etc;

(v) The plaintiff never met nor instructed the second defendant in any manner whatsoever.

[21] The second defendant contended that since it was not appointed by the plaintiff as his solicitor, it does not owe any duty of care to the plaintiff. The second defendant was appointed by the first defendant under the LSA, and it has fulfilled all its contractual obligations to the first defendant.

[22] However, the plaintiff adduced the following evidence:

The First Property

The First Sale And Purchase Agreement ("SPA") For The First Property Where The Plaintiff Is The Purchaser ("The First SPA") (CBOD5 Part B pp. 37-46)

[23] At p. 36 of CBOD5 is a letter from the second defendant dated 26 October 2009 enclosing a duly stamped duplicate SPA dated 14 October 2009.

[24] The salient features of the SPA are:

(i) The plaintiff is the purchaser.

(ii) One Siti Kadijah Binti Muhammad Salim is named as the vendor.

(iii) The second defendant's name appears on the cover page of the duplicate SPA.

(iv) The signatures, of both the vendor and the plaintiff, as purchaser, were attested by Jagmohan (DW1), the sole proprietor of the second defendant.

(v) The property is described as:

> A unit of apartment bearing postal address, known as Unit No. E-3-07, Block E, Jalan Aman Putra, Taman Aman Putra, 52000 Kuala Lumpur measuring approximately 721 square feet in area ("the 1st Property").

(vi) The relevant portion of Section 10 of the first schedule to the SPA states:

10	Time and manner of payment of the balance of the purchase price	Within three (3) months from the date the confirmation from the Developer having been obtained and deposited with the Solicitors ("Completion Date").

(vii) The purchase price is RM65,000.

[25] The above scenario is repeated for the second property to the fifth property transactions excepts for the differences that are set-out below:

The First Resale SPA For The First Property Where The Plaintiff Is The Vendor ("The First Resale SPA") (CBOD5 Part B pp. 61-70)

(i) The plaintiff is the vendor.

(ii) One Savendar Kaur a/p Charan Singh is named as the purchaser.

(iii) The purchase price is RM65,000.

The Second Property

The Second SPA For The Second Property Where The Plaintiff Is The Purchaser ("The Second SPA") (CBOD5 Part B pp. 37-46)

[26] The cover letter is dated 26 October 2009 (CBOD5 p. 45). One Rinajeet Kaur a/p Hacharam Singh is described as the vendor.

[27] The purchaser is the plaintiff.

[28] The property is described as:

> A unit of apartment bearing postal address known as Unit No. 01-28, Akasia Suria, Jalan Residensi Warnasari 13/1, Bandar Puncak Alam, 45010 Kuala Selangor, Selangor Darul Ehsan measuring approximately 720 square feet in area ("the 2nd Property").

[29] The purchase price is RM93,000.

The Second Resale SPA For The Second Property Where The Plaintiff Is The Vendor ("The Second Resale SPA") (CBOD5 Part B pp. 6-70)

(i) The plaintiff is the vendor.

(ii) One Rinajeet Kaur a/p Hacharam Singh is named as the purchaser.

(iii) The purchase price is RM43,400.

The Third Property (SPA Not Prepared And Not Signed) (CBOD6 Part B p. 116).

[30] The address of the property is described as:

> Unit No. G-4-05, No. 2, Jalan PJU 10/9, Rumah Pangsa Rampai Idaman, Prima Damansara, Petaling Jaya ("the 3rd Property").

[31] The purchase price is RM44,600.

The Fourth Property (SPA Not Prepared And Not Signed) (CBOD6 Part B pp. 117-118)

[32] The address of the property is described as:

Unit No. K-G-01, Desa Mutiara Apartment, Jalan Indah, Sungai Jelok, Kajang ("the 4th Property").

[33] The purchase price is RM45,000.

The Fifth Property (SPA Not Prepared And Not Signed) (CBOD6 Part B p. 118)

[34] The address of the property is described as:

Unit No. 1621, Level 16, Block A, Damai Apartment, Jalan PJS 8/9, Taman Sri Subang, Petaling Jaya ("the 5th Property").

[35] The purchase price is RM52,650.

Payment Of The Purchase Price For The Five Properties

(a) At p. 298, Part C of CBOD6 (exh. P23), is the official receipt issued by the second defendant in respect of the purchase of the first property.

(b) At p. 299, Part C of CBOD6 (exh. P24), is the official receipt issued by the second defendant in respect of the purchase of the second property.

(c) At p. 460, Part C of CBOD7 (exh. P27), is the official receipt issued by the second defendant in respect of the purchase of the third, fourth and fifth properties.

The Second Defendant's Official Receipts And Bills For Legal Fees

[36] The relevant official receipts and bills for legal fees issued by the second defendant to the plaintiff appear in the following pages respectively, ie,:

(a) First Property

Plaintiff's purchase : Bill (p. 35 Part B of CBOD5) and official receipt [p. 335 Part C of CBOD7 (exh. P25)] for the sum of RM1,102.50.

Resale : Bill (p. 47 Part B of CBOD5) and official receipt [p. 397 Part C of CBOD7 (exh. P28)] for the sum of RM535.

(b) Second Property

Plaintiff's purchase : Bill (p. 47 Part B of CBOD5) and official receipt [p. 336 Part C of CBOD7 (exh. P26)] for the sum of RM875.70.

Resale : Bill (p. 47 Part B of CBOD5) and official receipt [p. 397 Part C of CBOD7 (exh. P28)] for the sum of RM535.

Total Payments Made By The Plaintiff To The Second Defendant

Property No.	Purchase Price Paid (RM)	Legal Fees & Disbursements Paid (Purchase) (RM)	Legal Fees & Disbursements Paid (Resale) (RM)
1	65,000.00	1,102.50	535.00
2	43,400.00	875.70	535.00
3	44,600.00	-	-
4	45,000.00	-	-
5	52,650.00	-	-
Total	**250,650.00**	**1,978.20**	**1,070.00**

[37] Therefore, the total purchase price paid is RM250,650 and total legal fees and disbursements paid by the plaintiff to the second defendant is RM3,048.20.

[38] The plaintiff's claim for special damages is for the sum of RM250,650 being the total purchase price of the five properties (it does not include any claim on the resale agreement) and the sum of RM3,048.20 being the total legal fees and disbursements for the first and second properties the above agreement both of which were paid into the account of the second defendant.

The Evidence Of The Developers As Adduced By The Plaintiff

[39] Four out of five subpoenaed developer witnesses attended court, ie, PW7, PW8, PW9 and PW10, and gave oral evidence. They tendered documentary evidence which clearly established

that each of the purported vendors described in the SPAs did not have any beneficial interest in the properties, which beneficial interest was instead vested in the names of individuals or companies who were not parties to the agreements entered into by the plaintiff. The plaintiff's case is that the plaintiff had entered into these SPAs with persons who were not the beneficial owners of the respective properties. The plaintiff contended that this was caused or occasioned by the negligence of the second defendant in not obtaining the developer's confirmation in verifying the identity of the beneficial owners of the properties and thus resulting in the plaintiff suffering loss and damages.

[40] The following evidence was given by the five witnesses from the developers:

First Property - Woo Lai Fong (PW7) (Mega Legacy (M) Sdn Bhd)

[41] She confirmed that her records show that the current beneficial owners are Rohaidah binti Muhammad and Abdul Rahman bin Muhammad and not Rinajeet Kaur a/p Hacharam Singh who was named as the purported vendor in the first SPA of the first property.

[42] She further confirmed that the second defendant has never contacted her for any developer's confirmation on the property.

Second Property - Erwan bin Samat (PW8) (Puncak Alam Housing Sdn Bhd)

[43] He stated that he was the one who signed the letter dated 29 July 2011 [p. 553 of CBOD7 (exh. P32)] that confirms that, based on their records, the beneficial owner is one Mohamed Nor bin Hassan and not Rinajeet Kaur a/p Hacharam Singh who was named as the purported vendor in the first SPA of the second property. He confirmed that the property was successfully auctioned to Nor Fadzilah binti Muhamad.

[44] He confirmed that the unit of apartment referred in Messrs CC Choo, Hazila & Teong's letter dated 23 July 2011 and the unit of apartment referred to in Puncak Alam Housing Sdn Bhd's letter dated 29 July 2011 were both referring to the same unit.

[45] PW8 tendered a copy of the original SPA (exh. P39), proclamation of sale (exh. P40) and deed of assignment (exh. P41) for the court's reference.

[46] PW8 also confirmed that the second defendant had never contacted him for any developer's confirmation on the property.

Third Property - Ms Thiruselvi a/p Kandasamy (PW10) (Rampai Tema Sdn Bhd)

[47] She confirmed that, based on their records, the current beneficial owners are one Muhammad Ismadi bin Linggi and one Faizawati binti Abdul Mutalab and they are also the original purchasers from the developer.

[48] To establish the beneficial ownership of the original purchasers, PW10 tendered a letter of offer from Rampai Tema Sdn Bhd to the original purchasers dated 12 August 2003 (exh. P45) and a letter dated 12 August 2003 on the booking fee of RM500 (exh. P46A) and the booking fee receipt (exh. P46B), an official receipt from Rampai Tema for the balance 10% purchase price of RM3,700 (exh. P47), letters and official receipts showing release of payments by the financier bank to the developer according to completion stages of the property (exhs. P48A, P48B, P49A, P49B, P50A, P50B, P51A, P51B, P52), and also the deed of assignment dated 22 November 2004 between Affin-ACF Finance Berhad (exh. P53) as the assignee and the original purchasers as the assignors.

[49] PW10 confirmed that the full purchase price will be fully paid pending the last release payment of 2.5% of the total purchase price which will only be released by the financier bank when the title is issued by the land office.

[50] PW10 did not bring the original SPA because her office has removed all the original SPAs for photocopying before submitting them to the land office to apply for the issuance of the strata title.

[51] She confirmed that the second defendant has never contacted him for any developer's confirmation on the property.

Fourth Property - (Penta Heights Sdn Bhd) (Note: There Is No Witness From The Developer)

[52] The plaintiff's solicitors have issued a subpoena to one Eng Kong Chuan, the director of Penta Heights Sdn Bhd, but they refused to accept service (exhs. P55A and P55B).

[53] The letters from Messrs CC Choo, Hazila & Teong for confirmation/information from developer/proprietor dated 5 August

2011, 5 October 2011 and 8 September 2011 are found in pp. 556 and 557 of CBOD7 (exh. P34), pp. 558 of CBOD7 (exh. P34) and pp. 559 to 560 of CBOD7 (exh. P35) respectively.

Fifth Property - Iskandar bin Abdul Wahab (PW9) (Bandar Subang Sdn Bhd)

[54] PW9 informed the court that his staff, Azizul, who has resigned from the company, faxed a letter dated 16 October 2009 (to KY Sim & Co) [pp. 561 and 562 of CBOD7 (exh. P36)], to Messrs CC Choo, Hazila & Teong. The letter indicates that the full purchase price for the property has been fully settled by Mariam binti Abdul Malik and his financier bank. In other words, Mariam binti Abdul Malik is the beneficial owner of the property.

[55] He confirmed that the second defendant has never contacted him for any developer's confirmation on the property.

[56] The second defendant contended that there were no payments of legal fees to them by the plaintiff in respect of three out of the five properties.

[57] It is true that there are no official bills and receipts issued by the second defendant to the plaintiff for payment of legal fees and disbursements regarding the third, fourth and fifth properties. The plaintiff only produced the official bills and receipts issued by the second defendant for payment of legal fees and disbursements for the first and second properties. The plaintiff is claiming the sum of RM3,048.20 which are the legal fees and disbursements for the first and second properties only, but not the other three properties. Therefore, for the purposes of such a claim, it is immaterial that there are no official bills and receipts for the third, fourth and fifth properties. However, the second defendant alleged that since there were no official bills and receipts issued by them, it shows that the second defendant had never acted as solicitor for the plaintiff for the transactions involving the third, fourth and fifth properties. I am of the view that even though there were no official bills and receipts for payment of legal fees and disbursements issued by the second defendant for the third, fourth and fifth properties, there are official receipts issued by the second defendant for payment of the full purchase price of the five properties by the plaintiff (exhs. P23, P24 and P27). These official receipts prove that the second defendant had received the full purchase price and kept the monies in its client's account, thereby

showing that the second defendant was in fact acting as solicitor for the plaintiff for not only the first and second properties, but also for the third, fourth and fifth properties.

[58] The full purchase price of the five properties were deposited into the second defendant's client's account before the five SPAs were executed.

[59] The court finds that even though there is no written retainer, it can be presumed or implied from the preponderance of evidence as shown by the conduct of the plaintiff and the second defendant, that there is in actual fact a retainer of the second defendant by the plaintiff for the sale and purchase of the five properties. It is clear that the second defendant allowed its name to be used as the solicitor on record for the SPAs.

Whether The Second Defendant Breached The Contract By Failing To Carry Out Its Professional Duties

[60] In view of the earlier finding of the court that there is no contract of appointment or written retainer between the plaintiff and the second defendant, there is no breach of contract or contractual obligations by the second defendant.

[61] However, based on the presumed or implied retainer, there is a solicitor and client relationship between the second defendant and the plaintiff. The plaintiff's claim is therefore dependent on his cause of action against the second defendant for the tort of negligence.

Whether The Second Defendant Is Liable For The Tort Of Negligence

[62] In *Wong Kiong Hung & Anor v. Chang Siew Lan & Another Appeal* [2009] 3 CLJ 751; [2009] 4 MLJ 183, Low Hop Bing JCA held:

> [27] To succeed in the tort of negligence against the solicitor, it is incumbent on the client to establish that:
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> (1) the solicitor owes the client a duty of care;
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> (2) there is a breach of that duty by the solicitor;
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> (3) the client has thereby suffered damage; and
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> (4) the damage is not too remote a consequence of the breach.

Whether The Second Defendant Owes The Plaintiff A Duty Of Care

[63] Since the court has found that a solicitor and client relationship exists between the second defendant and the plaintiff, it is without doubt that the second defendant owes the plaintiff a duty of care in its discharge of its professional duties as a solicitor.

Whether There Is A Breach Of The Duty Of Care By The Second Defendant As Solicitor

[64] The standard of care required of the second defendant is that of an ordinary competent solicitor using reasonable care and skill in the use of his special skill as a solicitor (see Federal Court case, *Swamy v. Mathews & Anor* [1967] 1 LNS 174; [1968] 1 MLJ 138, *Bolam v. Friern Hospital Management Committee* [1957] 2 All ER 118 and *Greaves v. Baynhem Meikle* [1975] 3 All ER 99 per Lord Denning).

[65] The question is whether the second defendant had breached that standard of care in the transactions regarding the five properties.

[66] From the evidence adduced by the plaintiff and the other plaintiff's witnesses, it is clear that the second defendant failed in the exercise of his duty of care to the plaintiff. The second defendant was negligent in the exercise of its professional duties and responsibilities as solicitor in the manner as pleaded by the plaintiff, in para. 12 of the statement of claim, namely:

(a) to conduct proper searchers on the land titles on which the Said Properties are erected;

(b) to peruse, check and/or verify, and seek confirmation on the rightful ownership of the Said Properties;

(c) to communicate with all relevant parties/authorities for the relevant consents and/or approvals for transfers/assignments of the Said Properties upon their issuance of separate individual titles;

(d) to inform/communicate with the relevant authorities, developers and or proprietors relating to the transactions on the Said Properties;

(e) to perform its duties as Solicitors pursuant to the sales and purchase agreements relating to the said Properties;

A (f) to hold as stakeholders the purchase price in accordance with the terms and conditions of the respective sales and purchase agreements relating to the Said Properties;

(g) And generally to carry out its duties and responsibilities that are required and or expected from that of a firm of
B Solicitors; and

(h) Any of the above.

[67] The second defendant contended that they were never
C appointed by the plaintiff as solicitor to act for him and that the transactions here were not in the normal conveyancing practice. The conduct of the plaintiff shows that the sales and purchase transactions were done under the investment scheme of the first defendant according to the asset agreement. The plaintiff paid the
D first defendant the sum of RM23,100 (para. 5, statement of claim) as an initial administrative fee on the basis that the first defendant would source for properties and sell properties on behalf of the plaintiff. The plaintiff admitted to the presence of a risk in dealing with these transactions.

E **[68]** The second defendant pointed out that the plaintiff, under cross-examination, admitted to the following:

(a) he signed the asset agreement with the first defendant at the first defendant's office. The sole proprietor of the second
F defendant was not present;

(b) the agreement was not executed by the second defendant;

(c) the five properties were offered by the first defendant and the plaintiff confirmed the purchases with the first defendant and
G not the second defendant;

(d) the plaintiff went to the first defendant's office instead of the second defendant's office, to execute the SPAs;

H (e) the plaintiff has never met and communicated with the second defendant;

(f) the plaintiff has never given any instructions to the second defendant;

I (g) the plaintiff did not pay any legal bill for the three purchased properties to the second defendant; and

(h) the plaintiff also admitted in not receiving the bills or demanding for three legal bills for the purchase of properties from the second defendant.

[69] The plaintiff had admitted to attending the road shows organised by the first defendant to promote their business and services wherein the plaintiff was informed regarding the preparation of the legal documents of their investment being done by Alseth (as confirmed by Nallini, DW3) (see eg, the first defendant's letter dated 9 April 2007 in CBOD2 Part C pp. 24 and 25 to Jagmohan/DW1, who himself is also an investor in the same investment scheme, where DW1 was notified, just like any other resident/purchaser, that the legal documentation would all be done by Alseth).

[70] The second defendant relied on the evidence of DW2, Pathmanathan a/l K Rajaratnam, the former employee and legal executive of the first defendant, who stated that all the searches and legal documentation, including the SPAs and deeds of assignment for the first defendant's members of the investment scheme, including the plaintiff, were carried out by Alseth, the legal division of the first defendant, and not by the second defendant. DW2 further stated that all times the staff of the first defendant or Alseth attended to the execution of the documentation by all parties and to the stamping of the documents. Collection of the SPAs was done at Alseth's office in Wisma Pantai.

[71] It is true that the plaintiff purchased the five properties based on the asset agreement with the first defendant mainly for investment and resale, and the transactions were not executed according to normal conveyancing practice. From the provisions of the asset agreement and the LSA, and the evidence adduced, it is clear that the first defendant, through its president, director, shareholder and mastermind, Paramjit Singh a/l Charan Singh, was the main player in the whole investment scheme. The first defendant was the one dealing with the plaintiff and the one giving instructions to the second defendant and/or Alseth, as the case may be.

[72] It is also obvious that the plaintiff is now pursuing the claim against the second defendant to recover his losses since the first defendant has shut down its operation.

[73] The undeniable fact here is that the second defendant had agreed with the first defendant, through the LSA, that it would provide all the necessary legal services to the first defendant for

the first defendant's services to the first defendant's clients/residents (including the plaintiff), with assistance from Alseth (see cls. 1, 2, 3, 3.1 and 3.2, and 7 of the LSA in CBOD6 Part C pp. 4 to 8 ie, exh. D59).

[74] The second defendant, by receiving the full purchase price of the five properties and keeping it in its client's account, by attesting the SPAs, and by issuing official bills and receipts to the plaintiff cannot deny that it was not acting in the capacity of solicitor for its client/the plaintiff for the sale and purchase transactions.

[75] The second defendant contended that it was not a stakeholder for the full purchase price since the plaintiff paid the sum even before the SPAs were signed. In my opinion, it is immaterial that the sum was paid before, and not after, the SPAs were signed. What is important here is that the second defendant willingly accepted the sum and kept it in its client's account. The second defendant made no protest about it, and therefore cannot now deny that it was acting as stakeholder for the monies paid.

[76] Even though the transactions herein are part of the plaintiff's participation in the investment scheme pursuant to the asset agreement, the fact remains that when the properties are to be purchased by the plaintiff, the second defendant has a duty to conduct the necessary searches regarding the properties in order to ensure that the plaintiff is purchasing the properties from the true owners and that the plaintiff will be guaranteed the beneficial ownership, and finally the legal ownership, of such properties.

[77] The second defendant contended that the necessary searches to be made, the SPAs, and all the legal documentation were not done by him but by the first defendant and Alseth. The court finds that the second defendant, *vide* the LSA, had agreed to appoint Alseth to assist the second defendant in all the legal documentation etc. regarding the transactions for the properties. This can be clearly seen in cls. 3.1 and 3.2 and 4 of the LSA:

> 3.1 Legal Firm hereby agrees to solely appoint the company known as Alseth Corporation (M) Sdn Bhd as the sole provider for all the backend resource and support on the preparation of the necessaries legal documentation, land searches, Secretarial service collection of documents, liaising with AFS's clients (First Party), issuance of letters, phone and fax calls for all the work arising from the agreement entered between the First Party and AFS under the said Agreement.

3.2 Therefore based on Alseth Corporation (M) Sdn Bhd continuous support to the Legal Firm on the preparation of documents and incidentals on the above matter, the Legal Firm hereby agrees to pay the services of Alseth Corporation (M) Sdn Bhd in the following manner ie, the receipt of the Discounted Legal Fees and disbursement shall be paid in the following proportion between both parties:-

	Alseth Corporation (M) Sdn Bhd	Legal Firm
First Year	70%	30%
2nd - 3rd Year	65%	35%
4th - 5th Year	60%	40%
Fifth Year onwards	55%	45%

All the costing for the receipts book printed for the Legal Firm shall be borne by both parties according to the receipt of the proportion of the Discounted Legal fees and Disbursement. Taxes chargeable on the Legal Firm shall be paid in proportion of both parties as stated above inclusive of the discounted sum herein.

4. Alseth Corporation (M) Sdn Bhd and Legal Firm shall share the sum in equal proportion for the sum that is received under the aborted charges. Alseth Corporation (M) Sdn Bhd hereby agrees to appoint 2 staffs to assists the Legal Firm in preparing the legal documents, other incidentals documents and to do the necessaries as stated at Clause 3.1. The salary and expenses of the staffs shall be solely borne by Alseth Corporation (M) Sdn Bhd.

[78] Both the first defendant and Alseth are companies incorporated under the Companies Act 1965, and not legal firms which operate with a practising certificate issued under the Legal Profession Act 1976 ("LPA"). In fact, the sharing of legal fees between the second defendant, a legal firm, and Alseth, a company, as provided in cl. 3.2 of the LSA is not allowed under the LPA and the Solicitors' Remuneration Order 2005, but that is not the subject matter of this suit. What is important here is that, out of the three parties involved ie, the first defendant, the second defendant and Alseth, only the second defendant is practising as a legal firm and it is clear proof that the second defendant, when

attesting the relevant signatures of the parties in the SPAs, was holding itself out as the solicitor on record for the plaintiff. This is further fortified by the official bills and receipts issued by him for the sale and purchase transactions of the five properties. The bill for legal fees and disbursements for one of the five properties which the second defendant issued to the plaintiff (CBOD5 Part B p. 47) states very clearly the second defendant's professional charges for performing work which is normally done by a solicitor for a sale and purchase transaction:

> TO OUR PROFESSIONAL CHARGES for acting for you in respect of the above matter; inclusive of perusal, correspondence, preparing Sale and Purchase Agreement and Deed of Assignment; to our attestation of the said Agreements; to our attending to the stamping, completing the matters and to all other attendances not specifically set forth herein:-
>
> 1. Sale and Purchase Agreement
>
> 2. Deed of Assignment
>
> DISBURSEMENTS
>
> 1. Stamping fee for:-
>
> (a) Sale and Purchase Agreement (4 copies x RM10.00)
>
> (b) Deed of Assignment
>
> 2. Adjudication fee
>
> 3. Stamp Duty on Deed of Assignment (to be advised later)
>
> 4. Land Search Fee
>
> ...

[79] All legal fees for the transactions in question were paid by the plaintiff to the second defendant.

[80] Duly stamped copies of the duplicate SPAs were forwarded to the plaintiff *via* the second defendant's letterhead.

[81] Based on the totality of the evidence adduced, the court is satisfied that the second defendant is liable to the plaintiff for the tort of negligence regarding the sale and purchase transactions of the five properties.

Whether The Plaintiff Is Entitled To Be Paid For The Loss And Damage Suffered

Joint And Several Liability

[82] Even though the plaintiff has obtained judgment in default against the first defendant, the plaintiff is entitled to get judgment against the second defendant for the following reasons:

(i) the plaintiff's claim against the first defendant is based on a different cause of action ie, for breach of the asset agreement and the services provided by the first defendant.

The plaintiff's claim against the second defendant is for the tort of negligence in the exercise of its duty of care as solicitor.

Here, the liability of the first and second defendants are joint and several. The discharge of liability by one does not discharge the liability by the other. Where there are two different causes of action, the liability can be several (see *Choo Ah Kow v. Yeow Yew Thiam & Anor* [1989] 1 CLJ 128; [1989] 1 CLJ (Rep) 14, Supreme Court, at p. 15, and *Hagemeyer Trading Co (M) Sdn Bhd v. Gibson Trading Co* [1978] 1 LNS 58; [1978] 2 MLJ 101, Federal Court, at p. 104).

(ii) there is no proof that the plaintiff has executed the judgment against the first defendant. For as long as such judgment is not executed, the plaintiff is entitled to pursue the present claim against the second defendant.

[83] In *Hagemeyer Trading* (*supra*), the Federal Court referred to Swinden Eady LJ in *Isaacs & Sons v. Salbstein* [1916] 2 KB 139 who held that where the obligation binds two or more persons severally, a judgment against one is no bar to an action against the other. Swinden Eady LJ quoted Bayley B in *Lechmere v. Fletcher Cr & M* at p. 635, who laid down the principle relating to the doctrine of election and joint and several liability:

> There are many cases in the books as to joint and several bonds, from which it appears, that, though you have entered judgment on a joint and several bond against one obligor, you are still at liberty to sue the other; unless indeed the judgment has been satisfied : but so long as any part of the demand remains due, you are at liberty to sue the other, notwithstanding you have obtained judgment against one.

A Extent Of The Second Defendant's Liability

Contributory Negligence By The Plaintiff

[84] The second defendant raised the issue of contributory negligence as a defence. However, counsel for the plaintiff relied B on the decision of James Foong J (as he then was) in *Hamizan bin Abd Hamid v. Wong Kok Keong & Anor* [1994] 4 CLJ 122 at p. 124 and submitted that "contributory negligence is still required to be pleaded by the defendant, and failure to do so is fatal to the defence even though contributory negligence on the part of C the plaintiff is found to exist".

[85] With respect, I do not agree that contributory negligence has to be pleaded by the second defendant here. The issue before this court is whether the second defendant is negligent and, if so, D to what extent. If, in the course of evaluating the evidence, the court finds that there is negligence on the part of the second defendant, but also finds that there is contributory negligence on the part of the plaintiff, then in assessing the quantum of damages to be paid to the plaintiff, it would be grossly unjust and wrong E for the court to close its eyes to such contributory negligence and award damages based on a 100% liability. I am of the firm view that any contributory negligence by the plaintiff must be considered.

F **[86]** The court finds that there is contributory negligence by the plaintiff. It is clear from the evidence adduced that the plaintiff entered the asset agreement mainly for profits to be made through the investment scheme operated by the first defendant through Paramjit Singh a/l Charam Singh. The plaintiff never took the G trouble to check up on the whole scheme or to meet the vendors or owners of the five properties before paying the full purchase price and entering the SPAs. The plaintiff knew that he did not sign any document directly with the second defendant to appoint the second defendant as Solicitor but merely relied on the asset H agreement and instructions from the first defendant. Even though the second defendant was not present to attest the plaintiff's signature in the SPAs, the plaintiff went ahead and signed the SPAs. The plaintiff was not concerned over the fact that he signed the SPAs at the first defendant's office, and not at the I second defendant's office, in the absence of the second defendant who was to attest the signatures of the parties in the SPAs. The plaintiff never even applied his mind to think that he has to meet and confirm with the second defendant/Jagmohan regarding all the

legal work and documentation to be done for the sale and purchase of the five properties, and thereafter the resale of such properties.

[87] Due to the contributory negligence by the plaintiff, I am of the opinion that the liability of the second defendant in relation to the plaintiff's claim for RM250,650 is to be reduced by 50%. From the totality of the evidence adduced, it is clear that the first defendant is more blameworthy than the second defendant. However, that does not relieve the second defendant from liability to the plaintiff.

Decision

[88] Based on the above considerations, the plaintiff's claim against the second defendant is allowed as follows:

(a) The sum of RM250,650 less 50% for contributory negligence of the plaintiff;

(b) The refund of RM3,048.20 being legal fees, stamp duties and disbursements from the second defendant;

(c) Interest at the rate of 4% per annum on RM250,650 from the date of filing of the writ of summons to the date of judgment and at 5% per annum from the date of judgment to the date of full settlement; and

(d) costs of RM8,000.